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Appeal No. 87–1469

U.S. Court of International Trade
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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87-1469)

SPRINGFIELD INDUSTRIES CORP., PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

John B. Rehm, Busby, Rehm and Leonard, P.C., of Washington, D.C., argued for plaintiff-appellee. With him on the brief were *Jonathan Hemenway Glazier* and *Munford Page Hall, II*.

Douglas Letter, Department of Justice, of Washington, D.C., argued for defendant-appellant. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, *Joseph I. Liebman* and *Michael P. Maxwell*.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

(Decided March 29, 1988)

Before MARKEY, *Chief Judge*, RICH, *Circuit Judge*, and MILLER, *Senior Circuit Judge*.

MILLER, *Senior Circuit Judge*.

As related by the Court of International Trade, 663 F. Supp. 128 (CIT 1987), from which this appeal is taken:

> This is an action brought under 28 U.S.C. § 1581(i) by an importer of wire strand seeking injunctive relief and a declaratory judgment that the product it imports from South Africa is not "steel", barred from importation under Section 320 of the Anti-Apartheid Act of 1986, as amended, 22 U.S.C. § 5070 (West Supp. 1987).
>
> * * * * * * *
>
> The product in question is known as prestressed concrete strand or PC strand. It is composed of six steel wires wrapped around a seventh steel wire of a slightly larger diameter. The steel wires of which it is made are manufactured from steel rod, which is one of the basic forms in which steel is produced by a steel mill.
>
> PC strand is used to strengthen concrete for construction purposes. It is generally used by placing it under tension, pouring the concrete around it, letting the concrete set, and then releasing the tension, thereby compressing and strengthening the

concrete in which it is embedded. It can also be inserted in the concrete without tension and placed under tension later.

The following sequence of events led to the ban on the importation of this product.

On October 2, 1986, Congress passed the Comprehensive Anti-Apartheid Act of 1986, Public Law 99–440 [the "Act"] over the President's veto * * *. The Act contains a Title III entitled, "Measures By The United States To Undermine Apartheid." In Title III, Section 320, states as follows:

> Notwithstanding any other provision of law, no iron or steel produced in South Africa may be imported into the United States, except [not here applicable] * * *.

Section 601 of the Act, the first section of Title VI, covering "Enforcement and Administrative Provisions," provides that "the President shall issue such rules, regulations, licenses and orders as are necessary to carry out the provisions of this Act * * *".

On October 27, 1986, in Section 3 of Executive Order 12571 * * * the President made the Secretary of the Treasury responsible for implementing Section 320.

On November 19, 1986, the Department of the Treasury, through its Office of Foreign Assets Control, published final rules which it called, "South African Transaction Regulations" * * * which stated as follows:

> Guidelines are being published today in a separate notice related to this final rule delineating the products subject to the importation bans affecting agriculture, articles suitable for human consumption, iron ore, iron, and steel. The U.S. Customs Service will determine whether particular merchandise is subject to exclusion pursuant to these guidelines.

On that same date the Department of the Treasury published what it called a notice of interpretation entitled "South African Transactions Regulations—product Guidelines." * * * The Guidelines in relevant part, stated, as follows:

> This notice is published in conjunction with that final rule [the aforementioned South African Transaction Regulations] to inform interested persons of the guidelines to be employed by the U.S. Customs Service in determining which products are agricultural commodities, articles suitable for human consumption, iron ore, iron, or steel within the meaning of the Act.

The Guidelines then listed 15 categories as included within the ban of Section 320, by reference to the Item Numbers used in the Tariff Schedules of the United States * * *.[1]

663 F. Supp. at 129–30 (footnote omitted).

[1] At this point it should be noted that the Government, correctly, we believe, states that Springfield is mistaken in relying on the TSUS; that the TSUS are not controlling in defining "steel" in a social policy/foreign relations statute; and that Springfield has failed to provide "even the slightest indication" that distinctions in the TSUS were intended by Congress to govern the Anti-Apartheid Act.

Both parties recognize that there is a dearth of legislative history to turn to in determining the meaning of "steel" for purposes of Section 320 of the Act. However, ignoring the presumption of correctness of the agency's action, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971), the Court of International Trade relies upon "strong, basic interpretative considerations" such as "plain meaning, statutory context and general trade understanding which all indicate that 'steel' means the basic forms of the material known as steel." The Court of International Trade concludes that "absence of a clear indication of an expansive legislative intention for the meaning of 'steel' is decisive."[2]

On the other hand, the Government persuasively points out that Congress explicitly delegated to the Executive the authority to promulgate such orders and regulations "as are necessary" to implement the Anti-Apartheid Act, 22 U.S.C. § 5111 (Supp. IV 1986); that the Supreme Court has made clear that when the statutory language does not dispose of a particular issue and there is an explicit or implicit delegation to the Executive, the courts must accept the agency interpretation of the law if that interpretation is merely a permissible one, *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44, 865–66 (1984); and that as long as the Executive interpretation of the statute is not manifestly contrary to the terms of the statute, a court must accept it, even if that interpretation is not what the court itself would otherwise have given it. This "rule of deference" is particularly strong when, as here, not only is there an interpretation of the statute by the officers or agency charged with its administration, but the agency action is in the foreign affairs arena. *Regan* v. *Wald*, 468 U.S. 222, 242 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Duracell, Inc.* v. *U.S. Int'l Trade Comm'n*, 778 F.2d 1578, 1582 (Fed. Cir. 1985).[3]

Accordingly, we hold that the Court of International Trade's conclusion, that banning the importation of PC strand from South Africa was *ultra vires*, was error.[4]

As to Springfield's argument that other steel products should also have been included in the ban on imports from South Africa, the agency may properly implement a statutory scheme a step at a time. *See Dandridge* v. *Williams*, 397 U.S. 471, 486–87 1970). Also, it has not been shown that banning such other products would further the Congressional purpose.

Accordingly, we hold further that the Government's ban on imports of PC strand from South Africa was not arbitrary or capricious.

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[2] Such a "clear indication" could vary with the eyes of the beholder.

[3] We note the Government's argument that the Treasury Department Office of Foreign Assets Control attempted to coordinate United States policy with respect to the embargo on South African steel with the policies adopted by Canada, our largest trading partner; that after the Anti-Apartheid Act was passed, but before the Treasury Department regulations were published, Canada included wire products within those items from South Africa whose imports to Canada are banned.

[4] We further note that the Executive possesses independent constitutional authority in the area of foreign affairs in addition to his authority under the Act. *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

In view of the foregoing, the Court of International Trade's judgment is reversed, the injunction is dissolved, and judgment is entered in favor of the Government.

REVERSED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 88–33)

ARMSTRONG RUBBER CO. AND COOPER TIRE & RUBBER CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 84–10–01444

Before WATSON, *Judge.*

[The Court reverses and remands a determination by the International Trade Commission that there was no reasonable indication of material injury or threat of material injury from imports of radial tires from the Republic of Korea. The Court holds that the ITC did not have clear and convincing evidence to support its determination but relied on the full measure of its discretion to reach its conclusions. At a stage when only a reasonable indication needed to be made by the petitioner, the ITC's exercise of its full discretionary powers amounted to arbitrariness.]

(Dated March 17, 1988)

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson* and *J. Eric Nissley*) for plaintiffs.

Lyn M. Schlitt, General Counsel, *Judith M. Czako*, Acting Assistant General Counsel and *Kristian Anderson*) for defendant International Trade Commission.

Arnold and Porter (*Thomas B. Wilner, Sukhan Kim, Duane K. Thompson*) for defendant-intervenors Hankook Tire Manufacturing Co., Ltd., *et al.*

MEMORANDUM OPINION AND ORDER

WATSON, *Judge:* This action began in 1984 when plaintiffs challenged the negative preliminary antidumping injury determination by the United States International Trade Commission ("ITC") in Radial Ply Tires For Passenger Cars From the Republic of Korea, Investigation No. 731–TA–200 (Preliminary), USITC Public 1572, 49 Fed. Reg. 36712 (1984). The determination that there was no reasonable indication of material injury or threat of injury from imports of tires from the Republic of Korea brought an end to the investigation. In the judicial review which ensued, this Court granted plaintiffs' motion for judgment on the record on the ground that the ITC had applied an unlawfully stringent standard in determining whether there was a reasonable indication of material injury or threat of material injury. *Armstrong Rubber Co.* v. *United States*, 9 CIT 403, Slip Op. 85–85, 614 F. Supp. 1252. That decision relied on the Court's earlier ruling in *Republic Steel Corp.* v. *United States*, 8

CIT 29, 591 F. Supp. 640 (1984) reh'g denied, 9 CIT 100, Slip Op. 85–27 (March 11, 1985) dismissed (Order of August 13, 1985, in Consolidated Court No. 82–03–00372) which set out at length this Court's opinion that the preliminary method used by the ITC was erroneous because it weighed conflicting evidence and did not simply decide whether the petitioners' allegations, taken as true, gave a reasonable indication of injury or threat of injury.

In any event, while the Court's *Armstrong* opinion was on appeal the Court of Appeals for the Federal Circuit rejected the rationale of *Republic Steel, supra,* in *American Lamb Co.* v. *United States,* 785 F.2d 994 (Fed. Cir. 1986) and remanded this action for reconsideration in light of that decision. Thereafter, plaintiffs filed a petition for writ of certiorari with the Supreme Court seeking review of a procedural point in the case. Following the denial of the petition for certiorari (107 S. Ct. 112 (1986)), the parties briefed those issues which remained in the case and which had not been earlier reached because of the Court's disposition of the case on the basis of the reasoning in *Republic Steel.*

Plaintiffs claim that the ITC gave unreasonable weight to what it perceived as the generally healthy attention of the domestic tire industry and too little attention to the reasonably indicated effect or threat of the imports. Plaintiffs also claim that the ITC erred in failing to find an indication that the imports were causing downward pressure on the prices of domestic passenger tires in the replacement tire market; that the ITC failed to recognize the indication of threat which arose from economic factors which would force domestic producers to rely more on the replacement market; that in analyzing whether there was any indication of a threat, the ITC erred in using 1984 rather than 1985 and 1986 to assess the condition and performance of the Korean radial passenger tire industry; and finally, that the ITC generally gave unreasonably greater weight to submissions by the importers in preference to submissions by the domestic interests.

Before dealing with these points it is particularly important to explain the standards by which the Court has judged this determination. Now that we know that the ITC can weigh evidence at the preliminary stage and does not have to treat the petition as the equivalent of a complaint facing a motion to dismiss, the reasonableness or unreasonableness of that weighing process is the key. The standard must be one which does not place inordinate and unfair obstacles in the way of a petitioner. Yet it must not allow the fabrication of claims by the combination of ingenious pleading with ephemeral support. In addition, the standard should not allow the ITC to engage in its most discretionary forms of economic analysis, nor obviously, should it require the Court to undertake analysis of that type. In short, unless the standard for reviewing this determination establishes a significantly narrower degree of discretion than that which the ITC has in the making of its final determination, the pre-

liminary determinations of the ITC will be irreversible and judicial review of them will be meaningless.

Fortunately, our appellate court has provided guidance on this matter by suggesting the use of a standard which, for a civil matter, approaches as close as possible to the elimination of doubt. In *American Lamb* the Federal Circuit spoke of two important indicators which permit a negative preliminary determination, first, "clear and convincing evidence" of the absence of a reasonable indication of injury and second, a record which shows that it is "extremely unlikely that evidence of a 'reasonable indication' would be developed in a final investigation." 785 F.2d at 999. Although we are all aware of the logical impossibility of proving a negative, and the absence of any burden of proof on the respondents, for the purpose of strong emphasis, no doubt, the appellate tribunal also referred to "guidelines requiring clear and convincing evidence of '*no* reasonable indication', and no likelihood of later contrary evidence * * *" as providing fully adequate protection against unwarranted terminations. 785 F.2d at 1001. The appellate court further suggested that those guidelines would "weight the scales in favor of affirmative and against negative determinations."

The necessity of adjusting the weighing process to insure that investigations are not aborted when there is any reasonable indication that a full investigation might develop adequate factual support for the petition is further supported by our appellate court's reference back to the very first preliminary antidumping injury determination by the ITC in Butadiene Acrylonitrile Rubber From Japan, Inquiry No. AA1921–INq. 1, USITC Public 727 (1975). In that determination the ITC gave notably greater weight to inconclusive evidence on the likelihood of injury over such relatively stronger factors as price increases by the domestic sellers and a low level of market penetration by the imports. Had the ITC been exercising its normal range of discretion in a final determination, it could most certainly have reached a contrary conclusion.

All this serves to point out that even with a certain degree of discretion to weigh the evidence at this most preliminary stage, the weighing must be done with an emphasis on those factors which indicate the need for further investigation. With these points in mind, it can be seen that, although the ITC's weighing of evidence in this matter cannot be faulted if it were to be a demonstration of ultimate expertise, it is defective as a determination whose primary purpose is to fairly eliminate the existence of injury and definitively rule out the usefulness of further investigation. In this stage what is essential is not really the number of those factors which go *against* the indication of injury but rather *how those factors which suggested injury were eliminated as unworthy of further investigation.* Those factors included a decline in gross profits, operating profits, the ratio of operating profits to sales and cash flow, and the

suppression of prices in the replacement tire market, all this during a period of assertedly increasing demand.

The only direct reason given by the ITC for discounting those factors was its argument (ITC Opposition Memorandum at 31–35) that the domestic industry preferred to cultivate the original equipment market over the replacement tire market and, most importantly, that the original equipment market historically showed lower profits as new car production increased. This attributes curiously self-defeating behavior to the domestic industry, fails to take into account the fact that the replacement tire market represented approximately 72 percent of the total domestic passenger tire market in 1983 (R. Doc. 4 Confidential at A–21, Table 5) and ignores the fact that many of the domestic manufacturers do not even participate in the original equipment market. The phenomenon of an industry whose health varies inversely with that of an industry which is a major consumer of its products is also so unusual and contrary to ordinary understanding that it cannot be accepted as the foundation of a preliminary determination and as a matter which dooms a petition by clear and convincing evidence at the very start. This unusual and difficult rationale is something which should be determined in a full investigation.

Furthermore, if indeed it was the opinion of the ITC that the developments in the original equipment market would account for the declining factors in the domestic industry's condition without regard to Korean imports, then it seems entirely unreasonable to deny that the domestic industry would become even more heavily reliant on the replacement market and would suffer in that market because that was where the Koreans were concentrating. It seems that rather than deal directly with facts contrary to its thesis of no injury or threat of injury the ITC has arbitrarily chosen explanations of events or eventualities which avoid placing any possible responsibility on the Korean imports.

The ITC also did not deal with one of the most fundamental implications of an independent judgment as to the domestic industry's short-term future by the Automotive Group of Merrill Lynch Capital Markets, Securities Research Division, namely, that competition would intensify as the domestic industry tried to keep capacity utilization up by greater emphasis on the replacement market. [R. Doc. 1 Public at 122–23 (quoting from April, 1984 Merrill Lynch report contained in Exhibit 24 annexed thereto) and R. Doc. 33 Public at 18 and Exhibit G annexed thereto (July 1984 Merrill Lynch report) at 1, 4, 6, 10, 11, and 14.)] The ITC apparently rejected this rather reputable, independent prediction as conjectural at the same time as it gave credence to the purely self-serving projections of the Korean interests.

In addition, the period under scrutiny was marked by a Korean government restraint on the exports, imposed just prior to the investigation over the objection of the Korean manufacturers. If any-

thing, that artificial restraint should have generated a particularly strong interest in independent, authoritative projections. As far as the Court can see the petitioners' submissions on the likelihood of further intensification of the price competition in the replacement market was not rebutted by contrary evidence and it was simply unfair and arbitrary for the ITC to treat that prediction as supposition or conjecture under these circumstances.

It is the opinion of the Court that the deteriorating financial condition of an industry is not something that can be explained away in these circumstances when the petitioner has presented a reasonable indication of the incursion of the imports under investigation in a major segment of the domestic market and also provided a reasonable indication of price suppression in that segment. A discretionary judgment that the industry still has other positive financial characteristics is arbitrary at this stage of the proceedings when the crucial question is simply whether further investigation is necessary. The ITC's statement that it had been unable to confirm the specific instances alleged of lost revenues and sales falls short of what should be its obligation—to determine in a convincing way that such instances did not take place and could not be verified in a full investigation. This in itself is an indication of the unsuitability of the preliminary determination to the exercise of the full degree of selectivity and investigative discretion which the ITC has. In this phase the exercise of full discretion is nothing more than arbitrariness with respect to the rejection of reasonably indicated factors which are at least worthy of further investigation and which display classic indications of import-caused price-suppression. (R. Doc. 4. Confidential at A–47—A–51).

If we examine some of the details on which the ITC relied in order to absolve the Korean imports from responsibility for price suppression we find a degree of selectivity which is highly arbitrary. For example, the ITC used a March 1981 report by Merrill Lynch to blame the Michelin Tire Co. for price weakness at that time but ignored later Merrill Lynch reports (closer to the period under scrutiny) which named Korean imports as a reason for price suppression in the replacement market and a decline in profitability. [R. Doc. 1 Public at Exhibit 24 (March 1983 issue at 11; September 1983 issue at 1–3; December 1983 issue at 13)]. In these circumstances this went beyond discretion and passed over into arbitrariness. In the same way the ITC's assertions that price pressures in the replacement market were due to domestic firms fighting for increased market share defied the elementary logic that price cutting in a period of insufficient supply is irrational. The reliance on irrational conduct to explain away economic developments which can be analyzed in a more conventional and traditional way is also a sign of arbitrariness in the decisional process.

The same unexplained or inadequately supported selectivity is found in the ITC's threat analysis which the Court reviews from the

point of view of what was reasonably indicated as of the middle of 1984. To begin with, as noted earlier, the only evidence derived from independent experts, i.e. those with no interest in the antidumping proceeding, was not given any weight on the crucial question of what would occur to competition in the replacement market in 1985. This evidence indicated that demand in the original equipment segment and total demand would decline at the same time as additional production capacity would mature; this would intensify the already intense price competition in the replacement market and would increase the effect of dumped imports from Korea. See, R. Doc. 1 Public at 129–30. This evidence was not conjectural; it was of the type on which reliance could properly be placed under the standards set out in *Matsushita Electric Ind. Co., Ltd.* v. *United States*, 750 F.2d 927 (Fed. Cir. 1984) and to reject it in the context of a preliminary investigation, in favor of self-serving predictions by the respondents was arbitrary. At the preliminary stage, the petitioners made more than a showing of a mere "possibility." This was a reasonable indication of a real and imminent threat to the industry in the short term future and its rejection was not grounded in clear and convincing evidence to the contrary.

The ITC's evaluation of the Korean industry's capacity to constitute a threat suffered from the same arbitrary measurement and rejection of factors tending to indicate the existence of a threat. These were factors which met the standard set out in the law. *Alberta Gas Chemicals, Inc.* v. *United States*, 1 CIT 312, (1981).

The ITC ignored the artificial export limit which was unilaterally imposed by the Korean government, which could have been a perfect explanation for such decline in market penetration and import inventories as had taken place since 1983. It also ignored evidence that there would be increases in Korean production capacity through 1986 (with emphasis on product development for the United States radial tire market); that there were a number of formidable factors operating to discourage increases in Korean domestic tire sales; that an antidumping order had closed off their Australian market, that the Mid-East market was unstable and that the European market was small in comparison to that of the United States. See, e.g., R. Doc. 1 Public at 124–30 and R. Doc. 33 Public at 19–24 and their associated exhibits). Taking a very restrictive view which concentrated primarily on 1984, the ITC emphasized the rather subjective conclusion that the anticipated increase of Korean capacity would be "relatively small" and would not involve the participation of a new manufacturer before 1986. The ITC also stressed its conclusion that the Korean industry was operating at 100 percent of capacity in 1984, that its domestic sales would increase in 1984, and that its exports to Europe would nearly double in 1984. All this was a highly selective emphasis on a few factors in a very limited time-frame and did not approach what the Court would con-

sider to be clear and convincing evidence that a threat from Korean imports had not been reasonably indicated.

The Court notes that it has given no attention to any material in the briefs which refers to matters occurring after the determination and its conclusions are unaffected by what may or may not have actually happened to the domestic industry or to the Korean industry after that point. The motion to strike material from plaintiffs' briefs is therefore denied as moot.

In conclusion, the Court finds that the ITC did not reach its conclusions as to the non-existence of an indication of material injury or threat of material injury by means of clear and convincing evidence. It did so by the exercise of its fullest range of discretion, which, at this stage of the proceeding, when the need for investigation need only be reasonably indicated, amounts to ending the investigation by arbitrary and capricious means.

For these reasons, it is the opinion of the Court that the administrative determination should be reversed and remanded and should remain in that posture for further proceedings consistent with this opinion.

(Slip Op. 88–34)

UNITED STATES OF AMERICA, PLAINTIFF *v.* MONZA AUTOMOBILI AND ST. PAUL FIRE & MARINE INSURANCE CO., DEFENDANTS

Court No. 86–09–01200

Before NICHOLAS TSOUCALAS, *Judge.*

[Defendant's motion for summary judgment denied; plaintiff's cross-motion for summary judgment granted.]

(Decided March 18, 1988)

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Barbara M. Epstein)* for the plaintiff.

Sandler & Travis (John N. Politis) for the defendant-St. Paul Fire & Marine Insurance Co.

OPINION

Tsoucalas, *Judge:* The United States commenced this action pursuant to 28 U.S.C. § 1582(2) to recover unpaid liquidated damages resulting from defendant's breach of an entry bond.[1] Defendant concedes liability as surety under the bond in the amount of $6,180.00 and only contests plaintiff's request for pre-judgment interest on

[1] Monza Automobili is the principal and St. Paul Fire & Marine Insurance Co. is the surety under the terms of the bond. However, service of process was never effectuated against Monza Automobili; the summons and complaint were returned marked "wrong address." Therefore, this action proceeds only against St. Paul Fire & Marine Insurance Co., which hereinafter will be referred to as "defendant."

the amount due. The matter is before the Court on the parties' cross-motions for summary judgment solely on the issue of the appropriateness of pre-judgment interest.

BACKGROUND

In order to secure immediate delivery of a 1974 Ferrari automobile imported through the port of Houston on November 29, 1978, Monza Automobili ("Monza") filed a single entry delivery and consumption bond with the United States Customs Service ("Customs"), with defendant as surety. The Ferrari did not meet either the National Highway Traffic Safety Administration's ("NHTSA") safety standards[2] or the Environmental Protection Agency's ("EPA") emission standards,[3] but Monza promised to bring the vehicle into conformity with these requirements.

The automobile was never brought into compliance with the governing laws, however, and the district director, pursuant to 19 C.F.R. § 141.113(b), demanded redelivery of the Ferrari to Customs custody on August 29, 1980. As defendant concedes, Monza breached the bond on September 29, 1980 when it failed to redeliver the automobile to Customs custody.[4] Consequently, liquidated damages were assessed against Monza in the amount of $6,180.00 pursuant to 19 C.F.R. § 141.113(g). Under the terms of the bond, defendant is jointly and severally liable with Monza for the payment of the liquidated damages.

Customs issued three separate payment demands to Monza on the following dates: November 7, 1980; March 16, 1981; and August 20, 1984. These notices indicated that copies of the demands were sent to defendant.

After the second demand for payment, Monza filed a petition for mitigation which was denied by Customs on August 11, 1982. Customs first issued defendant a formal demand for payment on November 13, 1984. Plaintiff filed this action September 23, 1986, to collect the liquidated damages and pre-judgment interest.

DISCUSSION

The award of pre-judgment interest is a matter which lies within the discretion of the Court, governed by considerations of equity and fairness. *United States* v. *Imperial Food Imports*, 834 F.2d 1013, 1016 (Fed. Cir. 1987); *see also United States* v. *Lun May Co.*, 12 CIT ——, ——, Slip Op. 88–18 at 9 (Feb. 11, 1988); *United States* v. *Toshoku America, Inc.*, 11 CIT ——, ——, 670 F. Supp. 1006, 1012 (1987), *aff'd on rehearing*, No. 84–11–01590 (CIT Dec. 1, 1987), *appeal docketed*, No. 88–1221 (Fed. Cir. Feb. 5, 1988); *United States* v. *Utex Int'l Inc.*, 11 CIT ——, ——, 659 F. Supp. 250, 254 (1987), *appeal docketed*, No. 87–1414 (Fed. Cir. June 24, 1987).

[2] 19 C.F.R. § 12.80.
[3] 19 C.F.R. § 12.73.
[4] The Notice of Redelivery stated that "[a]rticles not returned * * * within 30 days of this notice become liable for liquidated damage."

Under circumstances comparable to the instant action, our appellate court upheld an award of pre-judgment interest from the date of final demand for payment. *Imperial Food*, 834 F.2d at 1016. The court reasoned that the government should be compensated for lost use of the money due: "[i]t would be inequitable and unfair for the government to make an interest-free loan of this sum from the date of final demand to the date of judgment." *Id.* The same considerations apply here. This Court finds defendant liable for pre-judgment interest from the last date Customs demanded payment, November 13, 1984. An award of pre-judgment interest before that date would be inappropriate because the liquidated damages were not fixed with certainty; Monza was still in the process of petitioning Customs for mitigation. Additionally, even though defendant was aware of its liability, Customs had not formally requested payment from defendant until November 13, 1984. Therefore, not until then did Customs become entitled to full payment from defendant on the liquidated damages.

Defendant argues that the government is undeserving of pre-judgment interest because of the laxity with which it pursued the action, by not issuing a formal demand until six years after entry. Although this Court will consider negatively any laxity on the part of the government, *see United States* v. *B.B.S. Electronics Int'l Inc.*, 9 CIT 561, 622 F. Supp. 1089, 1095 (1985); *United States* v. *Atkinson*, 6 CIT 257, 262, 575 F. Supp. 791, 796 (1983), the Court's finding that pre-judgment interest applies from the date of final demand takes into consideration plaintiff's lack of expedient prosecution.

The two year period after the final demand date does not constitute excessive delay on the part of the government in instituting this proceeding.[5] If the Court were to deny the award of pre-judgment interest for the two year period, defendant would have had, in effect, an interest free loan of the money due from the final demand date until judgment. This would be an inequitable result. Customs should not be put in a position where it is forced to bring an action in court before it can collect monies defendant admittedly owes.

Defendant next asserts that Customs issued the Notice of Redelivery subsequent to the final date of liquidation, contrary to its own regulations,[6] causing defendant to detrimentally rely on the validity of the regulations by assuming it could assert the Customs' violation as a legal defense in a court action taken by the government to collect the liquidated damages. Customs' application of its regulations, however, does not excuse defendant's liability for pre-judg-

[5] No clear guidelines exist for determining the date from which pre-judgment interest should be granted since this is a matter within the court's discretionary powers. *Compare Imperial Food*, 834 F.2d at 1016 (a one year delay was found not extreme; pre-judgment interest awarded from the date of final demand) *with United States* v. *American Motorists Insurance Co.*, 11 CIT ——, ——, Slip Op. 87-141 at 9 (Dec. 23, 1987), *appeal docketed*, No. 88-1261 (Fed. Cir. Feb. 23, 1988), (a two year delay from the denial date of the petition for mitigation was sufficient to deny pre-judgment interest until the date plaintiff brought suit) *and Lun May*, 12 CIT at ——, Slip Op. 88-18 at 9 (a five year delay from the date of final demand was found excessive; pre-judgment interest awarded only from the date Customs brought suit).

[6] The liquidation became final on April 29, 1979, sixteen months before the district director issued the Notice of Redelivery on August 29, 1980, a result which is contrary to the regulations. Pursuant to 19 C.F.R. § 141.113(f), "[a] demand for the return of merchandise to Customs custody shall not be made after the liquidation of the entry covering such merchandise has become final."

ment interest. *See Toshoku,* 11 CIT at ——, 670 F. Supp. at 1008; *Utex,* 11 CIT at ——, 659 F. Supp. at 253–54. Defendant's contention is a legal defense, more properly addressed to establishing liability rather than an equitable defense, applicable only after liability has been established. Customs' regulatory implementation, therefore, does not effect the equities involved in assessing pre-judgment interest in the instant action.

Defendant further contends that the liquidated damages claimed by plaintiff are penal in nature, not subject to the assessment of pre-judgment interest. Pre-judgment interest may not be awarded on punitive damages. *Imperial Food,* 834 F.2d at 1016; *American Motorists,* 11 CIT at ——, Slip Op. 87–141 at 8–9. However, "[l]iquidated damages are not penalties if they are reasonable and the exact amount of damages sustained would be difficult to prove." *Imperial Food,* 834 F.2d at 1016. The liquidated damages in the instant action are reasonable, being equal to the value of the Ferrari plus the estimated duties and taxes ($6,180.00). *See* 19 C.F.R. § 141.113(g); *cf. Imperial Food,* 834 F.2d at 1016 (liquidated damages were reasonable where it equalled the value of the involved merchandise plus estimated duties). Additionally, it would be difficult to measure, monetarily, the exact amount of damage caused by the Ferrari's nonconformity with governmental standards. Consequently, the Court finds the liquidated damages assessed not to be punitive in nature.

CONCLUSION

Defendant is liable for pre-judgment interest on the amount due Customs ($6,180.00) from the date of the final demand for payment, November 13, 1984, to the date of judgment. The rate of pre-judgment interest shall be in accordance with 26 U.S.C. § 6621. Post-judgment interest is also awarded in accordance with 28 U.S.C. § 1961.

(Slip Op. 88–35)

SURGIKOS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–12–01808

Before DICARLO, *Judge.*

Surgical sheets are determined to be ineligible for partial duty free treatment under item 807.00 of the Tariff Schedules of the United States (TSUS). Classification of the merchandise under item 256.87, TSUS, is affirmed.

[Judgment for defendant.]

(Decided March 18, 1988)

Rogers & Wells (Nina Bang-Jensen, Roger A. Clark, Robert v. *McIntyre, Eugene T. Rossides* and *Charlotte Lloyd Walkup),* for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice *(Judith M. Barzilay* and *Saul Davis),* for defendant.

DiCARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of surgical sheets under item 256.87 of the Tariff Schedules of the United States (TSUS), dutiable at 5.6% *ad valorem,* claiming the sheets are eligible for partial duty free treatment under item 807.00, TSUS. The Court concludes the surgical sheets do not meet all the criteria necessary for the partial duty free treatment under item 807.00, TSUS, and affirms Customs' classification.

The surgical sheets at issue are known as "Laparotomy-T Sheets with I.V. Armboard Drapes." Based upon the stipulations, exhibits, and testimony at trial, the Court finds that the sheets are designed to be placed on a patient's body before surgery in order to maintain sterile operating conditions during surgery. The sheets contain one rectangular opening, called a fenestration, through which a doctor may perform surgical operations or other procedures.

The sheets were assembled in Mexico from fabricated components produced in the United States. The process in Mexico is described in joint exhibit A to schedule C of the pretrial order:

> three 3″ × 4″ tabs of Drisite (Honshu)/Fabric 450, containing two holes each, described as 2-holed tubing tabs, are glued to the edge of a sheet of 18″ × 28″ Drisite (Honshu). A sheet of SBR foam, a 12″ × 18″ sponge foam pad with a reinforced backing, is glued onto the edge of the Drisite (Honshu), with a 1″ overlap onto the Drisite (Honshu). Two tabs of Drisite (Honshu)/Fabric 450 are glued to the edges of the foam. The SBR foam/Drisite (Honshu) piece is glued onto a base sheet of 72″ × 80″ Fabric 450 forming a tail. A rectangular fenestration 12″ × 3″ with 1″ diagonal corner slits is then die cut through the Drisite (Honshu) and the base sheet. Alignment for proper placement of the Drisite (Honshu) onto the base sheet is provided by tape indicators affixed to the table on which such operations occur. The die was positioned with a template aligned to a corner of the Honshu. The tail is then glued, edge overlapping edge, to a base sheet of 36″ × 101″ Fabric 450, and the tail is finish folded. Two 14-⅝″ × 28″ Fabric 450 flaps are glued to the base sheet. The rest of the sheet is then finish folded according to specifications to permit aseptic application of the sheet to the patient.

Finish folding, also known as "functional folding," is not ordinary folding for packaging purposes. The unique folds are strategically positioned to aid the surgical team in particular operations to avoid contamination of the surgical site and the sheet itself. R. 8–19, 24, 287–94; Pretrial Order, Schedule C, ¶¶15, 28.

To be eligible for partial duty free treatment, subsection (c) of item 807.00, TSUS, requires that the United States components not be "advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting * * *." That fenestration and finish folding advanced the value and improved the condition of the assembled components is not contested. The question presented is whether fenestration and finish folding are operations "incidental to the assembly process."

Plaintiff first argues that finish folding is not an operation separate from the assembly process but rather is an actual act in assembly of this merchandise. The Court disagrees.

Based upon the stipulations and trial testimony, the Court finds that assembly of this merchandise involves the gluing of certain pieces of material together. In the Court's view, the surgical sheets are completely assembled after all gluing takes place. Assembly is therefore complete whether or not the merchandise is also folded in a specified manner to enhance its utility. Thus finish folding is an operation other than the actual assembly of these surgical sheets.

In deciding whether fenestration and finish folding are operations incidental to the assembly process, the Court is guided by *United States* v. *Mast Indus.*, 69 CCPA 47, 53–54, 668 F.2d 501, 506 (1981), which held that operations are incidental to assembly within the meaning of subsection (c) of item 807.00, TSUS, if such operations are determined to be of a "minor nature." *See also United States* v. *Oxford Indus.*, 69 CCPA 55, 668 F.2d 507 (1981).

After balancing all the relevant factors, the *Mast* court determined that buttonholing and pocket slitting operations were incidental to the assembly of women's pants. The factors found in *Mast* to be relevant to the determination were:

> (1) Whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor." * * *
>
> (2) Whether the operations in question were necessary to the assembly process, as were the slots and holes in [*Miles* v. *United States*, 65 CCPA 32, C.A.D. 1202, 567 F.2d 979 (1978)] * * *.
>
> (3) Whether the operations were so related to assembly that they were logically performed during assembly * * *.

Mast, 69 CCPA at 54, 668 F.2d at 506. Also, according to the *Mast* court, "[a]nother factor not addressed by the parties would be whether economic or other practical considerations dictate that the operations be performed concurrently with assembly." *Id.* n.7. The Court finds these factors, among others, are also relevant to the determination of whether fenestration and finish folding are incidental to the assembly process of surgical sheets.

The exhibits and trial testimony show that the cost of the components when shipped to Mexico is $3.03. *See* Plaintiff's Exhibit 3b

[2.88 (starting material) + 0.03 (starting labor) + 0.12 (starting burden) = 3.03]. Fenestration and finish folding costs are $.34. *Id. See also* R. 196 (42% of post-fenestration is finish folding) [.31 (post-fenestration labor) + .46 (post-fenestration burden) = .77, .77 × 42% = .32, .32 + .02 (labor and burden of fenestration) = .34]. Thus the costs of these operations are 11.2% ($.34/$3.03) of the cost of the affected component.

In considering costs comparisons, the Court also finds relevant the relationship between the costs of fenestration and finish folding and the total value added to the components in Mexico. The cost of the final product is $4.76. *See* Plaintiff's Exhibit 3b. Deducting the cost of components prior to shipment to Mexico ($3.03) from the final cost ($4.76) indicates the value added in Mexico is $1.73. Of that value added in Mexico, the costs of fenestration and finish folding is one-fifth, 20% ($.34/$1.73). Deducting the cost of other United States material added in Mexico ($.51), *Id.* [3.39 (final material) − 2.88 (starting material) = .51], from the total value added in Mexico ($1.73 − $.51 = $1.22) and then comparing the costs of fenestration and finish folding indicates that these operations are over one-fourth, 28% ($.34/$1.22), of the labor-related activities in Mexico. These several costs comparisons indicate that fenestration and finish folding are not operations of a minor nature.

The average time required for assembly, including gluing and moving the materials, is 273.46 seconds, and the average time needed to fenestrate and finish fold is 126.14 seconds. *See* Plaintiff's Exhibit 2 [42% × 280.1 (post-fenestration time) = 117.64, 117.64 + 8.5 (fenestration time) = 126.14, 399.6 (total time per sheet) − 126.14 = 273.46]. Thus fenestration and finish folding are equal to approximately half of the time required to assemble the whole article. Comparing fenestration and finish folding (126.14 seconds) to the total time involved in Mexico for one sheet (399.6 seconds) shows that these operations amount to almost one-third, 32% (126.14 seconds/399.6 seconds), of the time involved. By either time comparison, fenestration and finish folding are not operations of a minor nature.

The Court must balance these cost and time relationships with the other relevant factors. The Court first notes that unlike the slots and holes in *Miles*, which had to be drilled into steel beams before boxcars could be assembled, fenestration and finish folding are not necessary prerequisites to the assembly of these surgical sheets. The materials could be glued together, assembled, even if the sheets were never fenestrated or finish folded.

Nor is the Court persuaded that these operations are so related to assembly that they were logically performed during assembly. Fenestration involves the use of a machine to cut through several pieces of material, and finish folding is merely folding of the sheets in a specified manner. Neither operation is related directly to the

gluing procedures that the Court has found constitute assembly of this merchandise.

The other factor noted by *Mast*, but not elaborated on, concerns "whether economic or other practical considerations *dictate* that the operations be performed concurrently with assembly." 69 CCPA at 43 n.7, 668 F.2d at 506 n.7 (emphasis added). Plaintiff here makes much of the fact that fenestration is best performed after the two sheets being cut have been properly aligned and glued together. Plaintiff points to the government's concession that if the sheets were separately fenestrated before gluing then precise alignment of the fenestration "would be very difficult and the sterility of the sheet could be compromised." Pretrial Order, Schedule C, ¶15. Plaintiff argues that it is also practical to finish fold part of the sheet just prior to gluing of the two 14-⅜″ × 28″ Fabric 450 flaps to the base sheet, since the sheet must be gathered anyway in order to facilitate that gluing.

The Court accepts that for practical reasons it may be best to perform these operations pursuant to the manner in which plaintiff has established. The Court believes plaintiff is best able to evaluate its own product in determining how best to produce a marketable item.

The Court is not persuaded, however, that these practical considerations "dictate" that these sheets must be produced in this exact manner. Testimony at trial indicated that the sheets could be fenestrated prior to gluing and be sterilized thereafter. R. 58–59. Also, any folding which would gather the tail of the base sheet prior to gluing of the two flaps would suffice. R. 261–62.

Weighing the item and cost of fenestration and finish folding with all other factors this Court has deemed relevant, it is determined that these operations are not "incidental to the assembly process" within the meaning of subsection (c) of item 807.00, TSUS. The operations are not of a minor nature.

The Court holds that plaintiff's merchandise is not eligible for partial duty free treatment under item 807.00, TSUS. Plaintiff has failed to overcome the presumption in favor of Customs' classification of these surgical sheets under item 256.87, TSUS. That classification is therefore affirmed. The action is dismissed. Judgment will be entered accordingly.

(Slip Op. 88–36)

UNITED STATES, PLAINTIFF *v.* BONNEAU CO., DEFENDANT

Court No. 87–06–00745

Before TSOUCALAS, *Judge.*

[Plaintiff's motion to designate defendant's counterclaim a defense granted.]

(Decided March 18, 1988)

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Sheila N. Ziff*) for plaintiff.

Webster & Sheffield (*James L. Condren*) for defendant.

OPINION

TSOUCALAS, *Judge:* The issue presently before the Court is whether defendant's counterclaim against the government satisfies the pleading requirements of the Rules of this Court. The government initiated this action pursuant to 28 U.S.C. § 1582 to collect duties owing from defendant and to enforce penalties assessed against defendant under 19 U.S.C. § 1592 (1982). The government claims defendant falsely certified that the imported merchandise was the product or manufacture of a Generalized System of Preference (GSP) beneficiary country and that defendant omitted certain values and costs associated with these goods from the invoice prices and value information submitted to Customs. Thus, duties were assessed on these omitted values, as well as the penalty. In addition to denying these allegations, defendant has asserted sixteen defenses and one counterclaim. The counterclaim reads as follows:

> 37. Based on the foregoing denials and defenses, Defendant's counterclaim seeks to have this Court hold unlawful and set aside as unwarranted by the facts and undertaken without observance of procedure required by law all U.S. Customs Service action, findings and conclusions relating to any alleged duties or penalties assessed in connection with the entries referenced in Exhibit A. Defendant further seeks to have this Court permanently enjoin Plaintiff from taking any further action to collect such alleged duties or penalties. This counterclaim is brought pursuant to 5 U.S.C. §§ 702, 703, 706(2)(D) and 706(2)(F) and 28 U.S.C. §§ 1585 and 2643(c)(1). This Court has jurisdiction over the counterclaim under the foregoing statutes, 28 U.S.C. § 1583 and, if this Court has jurisdiction over Plaintiff's purported claims, which Defendant denies, principles of ancillary jurisdiction.

Defendant's Answer, ¶37. Plaintiff has moved to strike this counterclaim: for lack of jurisdiction, for failure to state a claim upon which relief may be granted, for vagueness, and for redundancy. In the alternative, plaintiff moves to designate the counterclaim an affirmative defense or require defendant to amend the counterclaim to make it more definite and certain.

DISCUSSION

The use of counterclaims has been encouraged as an efficient method for the fair and speedy disposal of all claims existing between two parties. *Louisville Trust Co.* v. *Glenn*, 66 F. Supp. 872 (W.D. Ky. 1946). This policy is incorporated into USCIT R. 13(a) which states:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if (1) the claim involves the imported merchandise that is the subject matter of the civil action, or (2) the claim is to recover upon a bond or customs duties relating to such merchandise.

Pursuant to 28 U.S.C. § 1583 (1982), this court has jurisdiction over any such counterclaim. Yet, a counterclaim must satisfy the requirements of USCIT R. 8(a), which dictates that a counterclaim must contain the basis of the court's jurisdiction, a statement showing the pleader is entitled to relief, and a demand for judgment.

Defendant alleges the counterclaim is brought pursuant to 5 U.S.C. §§ 702, 703, 706(2)(D) and (2)(F). However, § 702 provides that an aggrieved party is entitled to judicial review of the agency action; § 703 relates to the procedure for judicial review; and § 706 sets forth the applicable standards for judicial review. *See United States* v. *Federal Insurance Co. & Cometals, Inc.*, 6 CIT 243 (1983) (5 U.S.C. §§ 701, *et seq.* does not serve as the basis for a counterclaim). Defendant further relies on 28 U.S.C. §§ 1585 and 2643(c)(1), but these statutes relate only to the power of this court to grant equitable relief. None of these statutes grant this court jurisdiction to hear any particular claim, or authorize a specific cause of action. Further, defendant stated that this court has jurisdiction over the counterclaim under 28 U.S.C. § 1583. To the extent that defendant has a properly pleaded counterclaim, it may be asserted pursuant to 28 U.S.C. § 1583. *See e.g., United States* v. *Lun May Co.*, 11 CIT ——, 652 F. Supp. 721 (1987); *United States* v. *Gold Mountain Coffee, Ltd.*, 8 CIT 338, 601 F. Supp. 215 (1984). However, defendant must still demonstrate that the allegations state a claim for which relief may be granted.

Defendant asserts that its counterclaim is based in part on the denials and defenses that: plaintiff failed to comply with procedural requirements, no false statements were made, the costs and values of certain items which were omitted were not subject to duty, the penalty assessed should be mitigated or cancelled, and defendant's actions were not negligent or grossly negligent.

"A counterclaim is a cause of action in favor of a defendant upon which he might have sued the plaintiff and obtained affirmative relief in a separate action." *Hann* v. *Venetian Blind Corp. et al.*, 15 F. Supp. 372, 376 (S.D. Ca. 1936). Moreover:

> [a] counterclaim which merely sets forth matters seeking to defeat the plaintiff's claim which are put in issue by the plaintiff's own bill or by the affirmative defenses is not a counterclaim at all. It is merely an attempt to restate affirmatively defensive matter which is already available through the denial of the allegations of the plaintiff's bill and the affirmative defensive matter, * * * which any court is bound to strike from the answer.

Id. at 377. A counterclaim does not necessarily attack plaintiff's right of action, but if established will defeat, diminish, or overcome plaintiff's recovery. It is defendant's right of action. In comparison, a defense, while it also seeks to defeat or diminish plaintiff's right of recovery, *does* attack plaintiff's claim, setting forth reasons why that claim should not be granted. *Id.*

Defendant's assertions are in the nature of attacking plaintiff's claim. The first part of the counterclaim states that Customs' findings and conclusions are unwarranted by the facts. In the present situation, this does not set up a right of recovery but is a consideration in determining whether plaintiff's claim should be granted. Defendant further alleges that Customs' actions were undertaken without observance of procedure required by law. However, "failure to comply with regulations is considered an affirmative defense." *United States* v. *Atkinson*, 6 CIT 257, 259, 575 F. Supp. 791, 793 (1983), *aff'd*, 3 Fed. Cir. (T) 15, 748 F.2d 659 (1984). Merely incorporating the defenses and denials into the counterclaim without setting forth an independent basis for the action, serves only to restate the controversy, and the court is authorized to strike such a pleading. *Stanley Works* v. *C.S. Mersick & Co.*, 1 F.R.D. 43 (D. Conn. 1939).

Furthermore, the right to assert a counterclaim under 28 U.S.C. § 1583 does not provide a new cause of action against the government. *See Gold Mountain Coffee*, 8 CIT at 339, 601 F. Supp. at 217; USCIT R. 13(c). Where there is no specific Congressional authority for an original action against the government based on the claim, the counterclaim is similarly barred. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). The Court is pressed to find authority, statutory or otherwise, which permits defendant to initiate an action based on this counterclaim, *i.e.*, to prevent the government from seeking to recover the duties or penalty. *See e.g. Dennison Mfg. Co.* v. *United States*, 12 CIT ——, Slip Op. 88–1 (January 8, 1988) (plaintiff could not contest the issuance of a penalty notice by Customs in the absence of the government bringing an action to collect the penalty); *Seaside Realty Corp.* v. *United States*, 9 CIT 178, 607 F. Supp 1481 (1985); *see also United States* v. *Zuber & Co.*, 9 CIT 511 (1985) (although defendant barred from challenging inclusion of costs in valuation of goods via 19 U.S.C. § 1514, matter could be raised defensively in § 1592 action brought against defendant).

However, the Court is reluctant to dismiss the counterclaim in accordance with the guidelines of USCIT R. 8(d):

> When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Thus, defendant's allegations in ¶37 of its answer, improperly labeled a counterclaim, shall be deemed an affirmative defense. In light of this conclusion, it is unnecessary to address plaintiff's alternative arguments. So ORDERED.

(Slip Op. 88–37)

SILVER REED AMERICA, INC. AND SILVER SEIKO, LTD., PLAINTIFFS, BROTHER INTERNATIONAL CORP. AND BROTHER INDUSTRIES, LTD., PLAINTIFF-INTERVENORS *v.* UNITED STATES OF AMERICA, DEFENDANT, SMITH CORONA CORP. (F/K/A CONSUMER PRODUCTS DIV., SCM CORP., DEFENDANT-INTERVENOR

SMITH CORONA CORP., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, SILVER REED AMERICA, INC., SILVER SEIKO, LTD., BROTHER INTERNATIONAL CORP., BROTHER INDUSTRIES, LTD., AND NAKAJIMA ALL CO., LTD., DEFENDANT-INTERVENORS

Court No. 83–10–01522

Before NEWMAN, *Senior Judge.*

[Plaintiffs' motion for clarification granted; Smith Corona Corporation's motion for rehearing granted; motions consolidated *sua sponte.*]

(Dated March 18, 1988)

Willkie Farr & Gallagher (Christopher A. Dunn and *Zygmunt Jablonski, Esqs.)* for Silver Reed America, Inc. and Silver Seiko, Ltd.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart and *James R. Cannon, Jr.*, Esqs.); *Robert E. Walton*, Esq., General Counsel, for Smith Corona Corporation.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Velta A. Melbrencis*, Attorney) for the United States; *Lisa B. Koteen*, Acting Senior Counsel for Policy Office of Deputy Chief Counsel for Import Administration, Department of Commerce, of counsel.

MEMORANDUM OPINION AND ORDER

NEWMAN, *Senior Judge:* My memorandum opinion and order of January 12, 1988 (Slip Op. 88–5) reversed in part and remanded for further proceedings the final determination of the Department of Commerce, International Trade Administration ("ITA"), entitled *Portable Electric Typewriters from Japan; Final Results of Adminis-*

trative Review of Antidumping Order, 48 Fed. Reg. 40761 (September 9, 1983). I found, *inter alia,* that ITA erred in double-counting certain selling expenses which were deducted from the exporter's sales price ("ESP") for Silver's typewriters. Slip Op. 88–5 at 12, 21. Moreover, Slip Op. 88–5 determined that ITA erred in deducting from ESP an imputed interest expense for "time on the water" pursuant to 19 U.S.C. § 1677a(e)(2) since such expense was not incurred "in the United States." *Id.* at 8–9.

Here, plaintiffs move for clarification of the portion of Slip Op. 88–5 that pertains to the double-counting issue and seek an order requiring ITA on remand to correct *all* double-counting of selling expenses and not merely the double-counting error that occurred in six invoices identified by defendant.

Defendant and Smith Corona Corporation ("intervenor") oppose plaintiffs' motion and seek an order limiting ITA's review of double-counting errors on remand to those which concededly occurred in the six invoices.

Intervenor moves for a rehearing of the issue pertaining to the imputed interest expense for "time on the water." Essentially, intervenor and defendant contend that ITA may deduct all direct and indirect selling expenses related to United States sales regardless of the geographical location of the incurrence of the expense.

Plaintiffs' motion for clarification and intervenor's motion for rehearing are granted and *sua sponte* are hereby consolidated for purposes of the within memorandum opinion and order.

I

Plaintiffs' Motion for Clarification
The Double-Counting Issue

It is apparent from plaintiffs' motion and the responses thereto by defendant and intervenor that the parties have a reasonable disagreement concerning my remand order pertaining to the double-counting issue. Accordingly, in the interest of ITA's properly conducting the remand proceedings and expediting the resolution of the double-counting errors, I will further elaborate on the double-counting issue.

Slip Op. 88–5, noted that plaintiffs challenged "the double-counting of actual interest expenses for inventory financing in addition to the imputed inventory financing expense for the time period the merchandise was in Silver Reed's inventory." *Id.* at 7. Therefore, "[i]n order to determine the accuracy of Silver's claim, Commerce attempted to reconstruct the data using the final printout, verification report, and questionnaire responses" (*defendant's memo in response to plaintiffs' rule 56.1 motion at 6*).

Defendant admits that ITA erred in double-counting selling expenses in six invoices, but solely with respect to the time period between Silver Reed's sale of the goods to the unrelated customer and Silver Reed's payment to Silver Seiko for those goods (*defendant's*

memo at 6–7). Defendant requested a remand "[i]n order to reprogram the data, examine the calculations made for imputed direct and indirect selling expenses and to correct the errors previously made" (*Id.* at 7). Consequently, in Slip Op. 88–5 at 12, I "directed [ITA] to review the record and correct any errors in double-counting of selling expenses arising from imputation of such expenses."

Silver's motion for clarification of the foregoing portion of Slip Op. 88–5 posits that defendant should not limit its inquiry on remand to the six invoices defendant identified, but rather ITA should review the record and correct all errors in double-counting of selling expenses, including but not limited to, any erroneous double deduction of plaintiffs' actual and imputed inventory financing expenses.

Silver claims that in addition to imputing a presale inventory carrying expense, which was deducted from ESP, ITA also deducted Silver Reed's actual interest expense incurred in financing its inventory. Silver insists the administrative record establishes that its actual interest expense incurred in connection with pre-sale inventory financing was deducted from ESP and thus ITA double-counted Silver Reed's inventory carrying expenses by also deducting imputed interest expenses. *Plaintiffs' brief in support of its rule 56.1 motion at 50–51.* Plaintiffs premise their double-counting claim on ITA's alleged verification that Silver Reed's actual interest expenses related solely to carrying inventory. *Id. at 51; ITA's first Silver Reed verification report, exh. 16D, A.R. 4038–46; A.R. 3799; plaintiffs' reply to defendant's and intervenor's opposition to plaintiffs' motion for clarification at 15, n.10.* In that connection, plaintiffs stress that the administrative record shows that all loans obtained by Silver Reed were incurred very shortly after the date that Silver Reed's payment for purchase of merchandise from Silver Seiko was due. Intervenor, however, maintains that no double-counting of inventory financing costs occurred because the cost of holding inventory was paid for "by virtue of the extended payment terms between Silver Seiko and Silver Reed" (*intervenor's brief at 32*). The foregoing contention is denied by plaintiffs.

There is no dispute, that in principle, double-counting of adjustments to ESP is impermissible. In this case, ITA admittedly deducted from ESP imputed inventory carrying costs covering the period from the date of shipment of the merchandise from Japan to the date of Silver Reed's resale of the merchandise. Plaintiffs' assertion that ITA also deducted from ESP interest expenses actually incurred by Silver Reed to finance its inventory raises a serious question of fact that warrants further review by ITA.

Accordingly, it is hereby ordered that in addition to correcting the double-counting error respecting the six invoices defendant previously identified, ITA is directed to review the pertinent portions of the administrative record to ascertain whether in fact any actual interest expenses incurred by Silver Reed for presale inventory fi-

nancing were deducted from ESP. If after review of the record, ITA finds that a double-counting of presale inventory carry expenses occurred, as claimed by Silver, such error shall be corrected on remand.

Plaintiffs' application for permission to file a reply brief has raised no objection and the application is granted.

II

Intervenor's Motion for Rehearing
The Imputed Interest Expense for "Time on the Water"

As discussed in Slip. Op. 88–5 at 7–11, in making adjustments to Silver's ESP, ITA deducted an imputed interest expense for the period from the date of shipment of the merchandise from Japan to the date of sale of the goods by Silver Reed to unrelated United States purchasers. Hence, this imputed presale inventory financing expense covered the time period during which the merchandise was in transit, *viz.*, "on the water." In Slip. Op. 88–5 at 9, I agreed with Silver's contention in support of its rule 56.1 motion that the imputed interest expense for time on the water was improperly deducted by ITA from Silver's ESP since such expense was not incurred "in the United States" within the purview of 19 U.S.C. § 1677a(e)(2). Intervenor has moved for reconsideration of that ruling contending that the phrase "in the United States" does not limit the term "incurred," and in any event § 1677a(e)(2) was not intended to limit the deductability of selling expenses incurred by or on behalf of the exporter that are related to United States sales. After consideration of the more extensive briefing by the parties on the issue, I have concluded that while a literal reading of the statute might support Silver's position, nonetheless intervenor's and defendant's construction of the statute reflect the Congressional intent in the ESP adjustment provided by § 1677a(e)(2).

As aptly observed in *Asahi Chemical Industry Company, Ltd.* v. *United States*, 4 CIT 120, 548 F. Supp 1261 (1982):

> While it is true that "[t]he starting point in every case involving construction of a statute is the language itself," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975), nevertheless, as noted by the Supreme Court in *Lynch v.* Overholser, 369 U.S. 705 (1962):
>
> > The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, *e.g., Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459–462; *Markham* v. *Cabell*, 326 U.S. 404, 409 * * *.
>
> *Id.* at 710. See also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980). Learned Hand observed in this same connection that:
>
> > [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dic-

> tionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.
>
> *Cabell* v. *Markham,* 148 F.2d 737, 739 (2d Cir.), *aff'd,* 326 U.S. 404 (1945).

See also United States Steelworkers of America v. *Weber,* 443 U.S. 193, 201, *reh'g denied,* 444 U.S. 889 (1979); *Vivitar Corp.* v. *United States,* 8 CIT 109, 113–114, 593 F. Supp 420, 425–26 (1984), *aff'd* 3 CAFC 124, 761 F.2d 1552 (1985).

Fundamentally, too, a "reviewing court must accord substantial weight to an agency's interpretation of a statute it administers." *American Lamb Company* v. *United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986), citing *Zenith Radio Corporation* v. *United States,* 437 U.S. 443, 450–51 (1978, and *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

Intervenor and defendant correctly observe that if selling expenses must be geographically incurred in the United States to be deductible from ESP, then dumping margins would be masked in those instances in which selling expenses incurred by or for the account of the exporter related to United States sales are absorbed by the parent companies abroad. Indeed, in its September 18, 1987 reply brief at 12, Silver conceded that if an expense is "incurred for U.S. sales," it is deductible from ESP, "including financial expenses, incurred by a respondent in the foreign market but attributable to U.S. sales."

An analysis of the entire statutory scheme for ESP adjustments in § 1677a demonstrates that many preimportation expenses related to United States sales must be deducted from ESP. ITA's imputed interest expense for "time on the water" represents an opportunity cost incurred by or on behalf of the exporter in connection with United States sales. If ITA were precluded from deducting this imputed selling expense from the ESP, the essential price comparison to determine the margin of dumping, if any, becomes distorted and contrary to the purpose of the dumping law to achieve a fair price comparison. *Brother Indus., Ltd.* v. *United States,* 3 CIT 125, 140–41, 540 F. Supp. 1341, 1357 (1982), *aff'd sub nom Smith-Corona Group, SCM Corp.* v. *United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). Unless all of the exporter's selling expenses related to United States sales are deducted from ESP, there cannot be an equitable price comparison in the two markets. Thus, in *Smith Corona,* the Federal Circuit described the nature of the comparison as follows:

> Foreign market value and United States price represent prices in different markets affected by a variety of differences in the chain of commerce by which the merchandise reached the export or domestic market. Both values are subject to adjustment in an attempt to reconstruct the price at a specific, "common" point in the chain of commerce, so that value can be fairly compared on an equivalent basis.

713 F.2d at 1571–72. *See also Rhone Poulenc, S.A.* v. *United States*, 8 CIT 47, 68–70, 592 F. Supp 1318, 1336–37 (1984); *Zenith Radio Corp.* v. *United States*, 9 CIT 110, 116–119, 606 F. Supp. 695, 701–03 (1985).

In sum, the purpose of the antidumping statute is to create a comparison between foreign market value and United States price that is based on value at the same point in the chain of commerce. Failure to make a deduction from ESP to account for a selling expense (whether imputed or actual) before importation or "on the water" would impair the integrity of the price comparison since a value that includes the exporter's selling expenses incurred after shipment but before importation is not an estimate of the true f.o.b. origin price.

For the foregoing reasons, intervenor's motion for rehearing is granted. Slip Op. 88–5 is amended to hold that ITA correctly deducted an imputed interest expense covering the period that the merchandise was on the water, to the extent that there was no double deduction of presale inventory financing expenses, as claimed by Silver.

In the interest of expediting the remand proceedings pending before ITA, the two motions addressed herein were consolidated *sua sponte*. ITA's time for reporting the results of the remand to the court is extended to ninety days from the date of this order. Plaintiffs shall have thirty days thereafter in which to respond; defendant and intervenor shall have thirty days after receipt of plaintiffs' response to reply thereto.

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